Supreme Court, U.S.
FILED
SEP 08 2010
OFFICE OF THE CLERK

No. 10-74

In the Supreme Court of the United States

JAVIER RIVERA AQUINO, SECRETARY, PUERTO RICO DEPARTMENT OF AGRICULTURE, ET AL., PETITIONERS

v.

SUIZA DAIRY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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After reading respondents' briefs in opposition, one could be forgiven for forgetting what the First Circuit actually held in this case. It held that a federal court could order retrospective monetary relief against a sovereign as long as the necessary funds do not come directly from the general treasury. The First Circuit's decision conflicts with the decisions of this Court and numerous other circuits, and it is of exceptional importance to the Commonwealth of Puerto Rico and other sovereigns. It was for those reasons that Chief Judge Lynch stated that this case presents "serious issues" that "deserve [the] attention" of the Court. And it was for those reasons that twenty-six States have filed an amicus brief

asking this Court not only to grant review, but summarily to reverse the judgment below.

Respondents offer conspicuously little by way of a defense of the First Circuit's actual holding. Instead, they identify three potential vehicle problems that they claim justify the denial of further review. None of those issues, however, presented an obstacle to the First Circuit's reaching the holding it did, and none presents an obstacle to this Court's review either. Put simply, the First Circuit's decision cries out for further review and correction.

A. The Court Of Appeals' Decision Conflicts With The Decisions Of This Court And Other Circuits

1. As explained in the petition, this Court has repeatedly held that the exception to the principle of sovereign immunity first recognized in *Ex parte Young*, 209 U.S. 123 (1908), is available only where a plaintiff seeks prospective, rather than retrospective, relief. See, *e.g.*, *Verizon Md. Inc.* v. *Public Service Comm'n*, 535 U.S. 635, 645 (2002). This Court has also repeatedly held that, in determining whether the defense of sovereign immunity is available where the plaintiff is seeking retrospective monetary relief, a court should not consider whether the relief would take funds directly from the general treasury; instead, the relevant inquiry is whether liability would ultimately fall on the sovereign. See, *e.g.*, *Regents of Univ. of Cal.* v. *Doe*, 519 U.S. 425, 431 (1997). Accordingly, numerous courts of appeals have held that, regardless of the potential effect on the general treasury, sovereign immunity bars any suit in which the plaintiff is seeking retrospective monetary relief from the sovereign. See Pet. 10-13.

2. Respondents do not meaningfully dispute any of those propositions. Instead, they contend that the deci-

sion below gives rise to no valid conflict because the district court ordered "prospective injunctive relief," Vaquería Br. 13, and because the Commonwealth bears "no * * * potential monetary liability," Suiza Br. 11. That contention is flawed in every particular.

a. As a preliminary matter, the court of appeals in this case unambiguously concluded that it was *irrelevant* to the sovereign-immunity analysis whether the relief the district court ordered was prospective or retrospective. See Pet. App. 24a. Instead, it proceeded to hold that a federal court could order even retrospective relief against a sovereign as long as the necessary funds do not come directly from the general treasury. See *id.* at 25a-26a. It is that holding which cannot be reconciled with the decisions of this Court or other circuits and which, if allowed to stand, will have enormous consequences for Puerto Rico and other sovereigns.

b. Respondents seemingly suggest that the court of appeals' holding was simply unnecessary because the relief ordered was prospective. To begin with, in light of the court of appeals' plainly erroneous holding, if this Court were to conclude that there is any ambiguity as to whether the relief ordered was prospective or retrospective, it should vacate the judgment below and remand for the court of appeals to consider that issue in the first instance.

But in any event, there can be no doubt that the relief which the plaintiffs in this case were seeking, and which the district court ordered, was retrospective. In their complaint, respondents unambiguously sought to "*recover the losses they have experienced* on account of the unconstitutional acts and decisions herein under attack." Second Am. Compl. ¶ 92, at 39 (emphasis added). Notably, respondents do not disavow that claim in their briefs before this Court. In and of itself, the existence of that

claim is sufficient to trigger the Commonwealth's sovereign immunity. See pp. 6-7, *infra*.

The district court, moreover, did not simply allow respondents to recover a higher rate of return going forward, but also ordered ORIL to provide compensation for respondents' "deficient rate of return" starting from the beginning of 2003 (*i.e.*, more than eighteen months before respondents filed suit). Pet. App. 21a, 197a. The latter relief is retrospective by any measure, because, consistent with what respondents were seeking in their complaint, it would compensate them for a past violation of federal law. See *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986). Although respondents contend (Vaquería Br. 1; Suiza Br. 12-13) that the *purpose* of the relief was to enable them to rebuild their capital bases, the district court did not specifically state that it was ordering the relief for that purpose, see Pet. App. 197a; even if it had, the relief would not be prospective, because the relief would still be redressing a *past* violation, see *id.* at 60a & n.8 (Lynch, C.J., dissenting from denial of rehearing en banc);[1] and, in holding that the Commonwealth was not entitled to sovereign immunity, the court of appeals expressly declined to accept respondents' contention, see *id.* at 24a.

c. There can also be no doubt that the plaintiffs in this case were seeking to impose, and the district court actually did impose, monetary liability on the Commonwealth. As noted above, respondents sued petitioners, in their capacities as officials of the Commonwealth, in order to "recover the losses they have experienced on ac-

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[1] Indeed, respondent Vaquería acknowledges as much. See Br. 26 (noting that "the purpose of the injunction is to ensure that [respondents] do not go bankrupt *from their past losses*") (emphasis added).

count" of the alleged constitutional violations. Second Am. Compl. ¶ 92, at 39. Simply by virtue of the fact that respondents were *seeking* a court order awarding monetary relief against the Commonwealth for past constitutional violations, this case implicates the Commonwealth's sovereign immunity. See pp. 6-7, *infra*.

The district court, moreover, ordered ORIL to adopt a mechanism that would allow respondents to recover monetary damages for the Commonwealth's past constitutional violations. See Pet. App. 197a. It is irrelevant that, as respondents repeatedly note (Vaquería Br. 9, 13; Suiza Br. 14-15), the court did not specifically order the Commonwealth to pay "public" funds directly out of the general treasury or to raise the funds through a particular means (such as a tax), but instead allowed the Commonwealth to raise the funds "through * * * any * * * available mechanism of [its] choosing." Pet. App. 197a.[2] For sovereign-immunity purposes, the key fact is that respondents were seeking to impose, and the district court actually did impose, monetary liability on the Commonwealth—as is vividly illustrated by the fact that, by their own admission, respondents are already retaining money collected from the 1.5¢ surcharge on milk sales that the Commonwealth adopted to comply the district court's order. See Vaquería Br. 10, 12 n.1, 19 n.4.

This Court should not be distracted by respondents' efforts to introduce factual complexity where there is none. Because the court of appeals' actual holding cannot be reconciled with the decisions of this Court or oth-

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[2] It is therefore also irrelevant that, as respondents note (Vaquería Br. 2, 11, 18, 21, 22; Suiza Br. 11), petitioners did not argue below, in so many words, that the raised funds were "public in nature."

er circuits, the Court should either grant plenary review or reverse outright.

B. This Case Is An Optimal Vehicle For Consideration Of The Question Presented

Respondents identify three potential reasons why this case would be a poor vehicle for consideration of the question presented. Those reasons are both individually and collectively insubstantial.

1. Respondents contend (Vaquería Br. 22-23; Suiza Br. 6-7) that the Court should deny review simply because this case arises in an interlocutory posture. That contention is wholly unfounded.

To be sure, as respondent Suiza notes (Br. 6-7), this Court ordinarily prefers not to grant review when cases are in an interlocutory posture. But that has not been the Court's practice with regard to cases presenting questions of immunity, including sovereign immunity. To the contrary, the Court has held that rulings on questions of sovereign immunity are immediately appealable even at the motion-to-dismiss stage, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-147 (1993), and has itself granted review on such questions at that stage, see, *e.g.*, *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44 (1996). That is for good reason, because "[i]t is the fact that a private party is allowed to sue," not "the burden of litigation or the relief sought," that infringes sovereign immunity. *Alabama* v. *North Carolina*, 130 S. Ct. 2295, 2318 (2010) (Roberts, C.J., concurring in part and dissenting in part); see *Federal Maritime Comm'n* v. *South Carolina Ports Auth.*, 535 U.S. 743, 765 (2002). Put another way, the benefit of sovereign immunity would be entirely lost if a defendant could not invoke it until after trial. See *Metcalf & Eddy*, 506 U.S. at 143-144.

That rationale applies *a fortiori* here, where the sovereign-immunity issue comes to the Court not at the motion-to-dismiss stage, but rather at the preliminary-injunction stage. As respondents note (Vaquería Br. 8; Suiza Br. 2), the district court issued the preliminary injunction after more than fifty evidentiary hearings over three years. In doing so, moreover, the district court did not simply determine that respondents were *likely* to prevail on their constitutional claims; it definitively held that respondents had suffered past and ongoing constitutional violations. See Pet. App. 192a. Although the mere fact that respondents were *seeking* to impose monetary liability on the Commonwealth for past constitutional violations is sufficient to implicate the Commonwealth's sovereign immunity, the fact that the district court has held the Commonwealth liable, and ordered it to set aside funds to cover that liability, eliminates any doubt that further review is appropriate.[3]

2. Respondents next contend (Vaquería Br. 23-24; Suiza Br. 8-11) that the Court should deny review because it has not yet definitively held that Puerto Rico is entitled to sovereign immunity. That contention also lacks merit.

As a preliminary matter, as noted in the petition (at 7 n.1), the Court can decide this case on the assumption that Puerto Rico is entitled to sovereign immunity. The

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[3] Respondent Suiza contends (Br. 27-30) that petitioners waived the Commonwealth's immunity by participating in expert discovery after the district court rejected that defense. That is an exceedingly peculiar contention. When a district court proceeds with the case while an appeal on the immunity issue is ongoing, a sovereign is hardly required to refuse to participate in any further proceedings in the district court in order to preserve the immunity issue on appeal.

Court decided *Metcalf & Eddy* on that assumption, see 506 U.S. at 141 n.1, and there is no reason why the Court should do otherwise here. That is particularly true because respondents have not disputed the proposition that Puerto Rico is entitled to sovereign immunity at any stage of this litigation; indeed, they stop short of affirmatively disputing it even in their briefs before this Court. See Vaquería Br. 23; Suiza Br. 8.

In any event, the proposition that Puerto Rico is entitled to sovereign immunity is not open to serious debate. Since its decision in *Erzatty* v. *Puerto Rico*, 648 F.2d 770, 776 n.7 (1981) (Breyer, J.), the First Circuit has reiterated that Puerto Rico is entitled to sovereign immunity in at least twenty-seven other cases, stating some time ago that Puerto Rico's immunity is "beyond dispute." *Puerto Rico Ports Auth.* v. *M/V Manhattan Prince*, 897 F.2d 1, 9 (1st Cir. 1990). Although the issue primarily arises in the First Circuit because of its jurisdiction over Puerto Rico, other courts have concluded that Puerto Rico "enjoys the same immunity from suit possessed by the States." *E.g.*, *United States* v. *Laboy-Torres*, 553 F.3d 715, 721 (3d Cir. 2009) (O'Connor, J.).

That conclusion, moreover, is clearly correct. This Court has recognized that Puerto Rico possesses "a measure of autonomy comparable to that possessed by the States." *Examining Board of Engineers, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 597 (1976). As Justice O'Connor has explained, "[l]ike the States, [Puerto Rico] has a republican form of government, organized pursuant to a constitution adopted by its people, and a bill of rights." *Laboy-Torres*, 553 F.3d at 721. And to the extent that any contrary argument relies on the approach of the Insular Cases, which held that unincorporated territories do not enjoy the full protections of the Constitution, see, *e.g.*, Vaquería Br. 23 (citing *Balzac*

v. *Porto Rico*, 258 U.S. 298 (1922)), this Court has since distanced itself from that approach. See, *e.g.*, *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2255 (2008). The theoretical possibility that the Court could conclude that Puerto Rico is not entitled to sovereign immunity is thus no reason to deny review here.[4]

3. Finally, respondents contend (Vaquería Br. 24-25; Suiza Br. 21-23) that the Court should deny review because sovereign immunity does not bar a claim for retrospective monetary relief under the Takings Clause. That contention is invalid.

The courts of appeals have uniformly held that, notwithstanding the express reference in the Takings Clause to "just compensation," sovereign immunity bars a claim under the Takings Clause, like any other federal claim, for retrospective monetary relief. See, *e.g.*, *Seven Up Pete Venture* v. *Schweitzer*, 523 F.3d 948, 953-955 (9th Cir.), cert. denied, 129 S. Ct. 258 (2008); *DLX, Inc.* v. *Kentucky*, 381 F.3d 511, 526-528 (6th Cir. 2004), cert. denied, 544 U.S. 961 (2005); *John G. & Marie Stella Kenedy Memorial Foundation* v. *Mauro*, 21 F.3d 667, 674 (5th Cir.), cert. denied, 513 U.S. 1016 (1994); *Garrett* v. *Illinois*, 612 F.2d 1038, 1040 (7th Cir.), cert. denied, 449 U.S. 821 (1980).[5] Those courts have explained that "the * * * self-executing nature of the Takings Clause does not alter the conventional application of the Eleventh

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[4] Should the Court wish to put to rest any doubt concerning whether Puerto Rico is entitled to sovereign immunity, it should grant plenary review in this case and direct the parties to address that question in their merits briefing.

[5] The earlier First Circuit cases on which respondent Suiza relies (Br. 22-23) are readily distinguishable. See Pet. App. 61a n.9 (Lynch, C.J., dissenting from denial of rehearing en banc).

Amendment," noting that a plaintiff may still pursue a claim for injunctive and declaratory relief against a State in federal court and may also pursue a claim for retrospective monetary relief in state court. *Seven Up Pete Venture*, 523 F.3d at 954.

In support of the contrary argument, respondents cite a footnote in this Court's decision in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304 (1987). As the caption suggests, however, *First English* involved a takings claim against a county, which is not entitled to sovereign immunity in federal court. See, *e.g.*, *Northern Ins. Co.* v. *Chatham County*, 547 U.S. 189, 193-194 (2006). *First English* thus presented no issue concerning the potential availability of a takings claim for retrospective monetary relief against an entity that actually possesses sovereign immunity. In any event, in the cited footnote, the Court ultimately concluded only that "it is the Constitution that dictates the remedy for interference with property rights amounting to a taking"—not that the Constitution mandates that the remedy of retrospective monetary relief be available in *federal court* against an otherwise immune sovereign. See *First English*, 482 U.S. at 316 n.9. It is therefore unsurprising that, even after *First English*, lower courts have continued consistently to hold that sovereign immunity bars takings claims for retrospective monetary relief. See, *e.g.*, *Seven Up Pete Venture*, 523 F.3d at 953-954 & n.6; *DLX*, 381 F.3d at 527-528.

In addition, contrary to respondent Vaquería's contention (Br. 24-25), the question whether sovereign immunity bars a claim for retrospective monetary relief under the Takings Clause is logically subsequent, not antecedent, to the question whether sovereign immunity is available in the first place for respondents' takings and

other claims. Just as the court of appeals did, therefore, this Court may address and resolve the question presented without reaching the Takings Clause question. In the event the Court reverses the judgment of the court of appeals, respondents would be free to advance their Takings Clause argument on remand. And should the Court conclude that the Takings Clause question is a substantial one (notwithstanding the absence of a circuit conflict) and wish to resolve it, the Court can readily do so in this case in the course of plenary review.

* * * * *

The First Circuit's decision creates a dangerous loophole in an important constitutional principle. If allowed to stand, that decision will "provide an easy mechanism for evasion" of sovereign immunity, because a plaintiff will readily be able to structure his claim to circumvent the traditional prohibition on retrospective relief. Pet. App. 63a (Lynch, C.J., dissenting from denial of rehearing en banc). The First Circuit's reasoning is plainly incorrect. And its holding is of obvious importance not only to the Commonwealth of Puerto Rico, but also to other sovereigns, as evidenced by the amicus participation of a majority of the States. For those reasons, we respectfully submit that the First Circuit's decision warrants further review and correction.

* * * * *

The petition for a writ of certiorari should be granted. The Court may wish to consider summarily reversing the judgment of the court of appeals; in the alternative, the Court should set the case for briefing and oral argument.

Respectfully submitted.

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